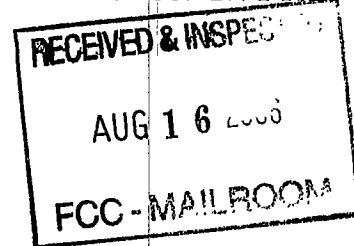




# NATIONAL ASSOCIATION OF THE DEAF

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August 14, 2006

UPS - OVERNIGHT

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
9300 East Hampton Drive  
Capitol Heights, MD 20743

Dear Madam Secretary:

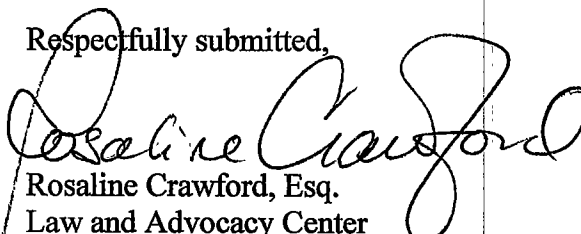
Enclosed please find an original and four (4) copies of an Application for Review of Clarification of Obligation of Video Programming Distributors to Make Emergency Information Accessible to Persons with Hearing Disabilities Using Closed Captioning, Public Notice, DA 06-1600 (August 7, 2006).

This Application for Review has been filed electronically under Docket Number 05-531 for ease of reference and availability to the public.

In addition, enclosed are five (5) additional copies; one (1) for each of the Commissioners.

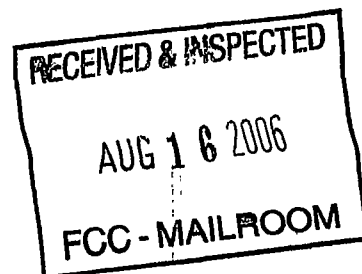
Please contact me if you have any questions.

Respectfully submitted,

  
Rosaline Crawford, Esq.  
Law and Advocacy Center  
National Association of the Deaf

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List A B C D E

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**



In the Matter of	)	
	)	
Closed Captioning of Video Programming	)	CG Docket No. 05-231
	)	
Telecommunications for the Deaf, Inc.	)	
Petition for Rulemaking	)	

**Application for Review of Clarification of Obligation  
of Video Programming Distributors to Make  
Emergency Information Accessible to  
Persons with Hearing Disabilities Using Closed Captioning**

**I. Introduction**

The National Association of the Deaf (NAD) and the undersigned consumer advocacy groups (collectively, "Petitioners") submit this Application for Review of the Federal Communication Commission's (FCC's) Public Notice released on August 7, 2006, which attempted to clarify the obligation of video programming distributors to make emergency information accessible to persons with hearing disabilities using closed captioning.<sup>1</sup>

The NAD and the undersigned consumer advocacy groups have been consistent advocates before the Federal Communications Commission ("FCC") for the promotion of equal access in telecommunications and media for the 31 million Americans who are deaf, hard of hearing, late deafened, or deaf-blind, so that they may enjoy the opportunities and benefits of the telecommunications revolution to which they are entitled. For the reasons stated below, we respectfully request that the FCC withdraw the Clarification contained in Public Notice

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<sup>1</sup> *Clarification of Obligation of Video Programming Distributors to Make Emergency Information Accessible to Persons with Hearing Disabilities Using Closed Captioning*, DA 06-1600 (August 7, 2006) (*Clarification Notice*).

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DA 06-1600, and/or further clarify that video programming providers otherwise required to provide, and those who are providing, real-time captioning of their live news programming, have the obligation to use captioning to make their emergency programming visually accessible by people with hearing loss.

## **II. Background**

On July 20, 2006, the FCC issued Public Notice DA 06-1483, *Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities (Reminder Notice)*. In this Public Notice, the FCC stated:

Given the transition to 100% closed captioning, which occurred on January 1, 2006, television stations that are not permitted by Commission rules to count captions created using the electronic newsroom technique (ENT) are now required to close caption all new non-exempt programming, including breaking news and emergency alerts. In other words, for these non-ENT stations, critical details of emergency information *must be closed captioned*.<sup>2</sup>

As the Notice explains, this statement was intended to apply to stations that are required by the Commission's captioning rules to use real-time captioning – and not electronic newsroom technique (ENT) – on live news programming. ENT is a method commonly used by local news stations that produces captions from teleprompters. Unfortunately, when a station uses ENT, only that part of the news program that has been pre-scripted (usually for the news anchor persons) is shown as captions. Deviations by the news anchor persons from the teleprompter script and virtually all live feeds from on-the-scene news reporters or people located outside the news studio are not shown or “captioned.” As a consequence, these portions of local news programs, which are often very significant (precisely because they *are* live), continue to remain inaccessible to people who are deaf or hard of hearing. ENT cannot and does not provide consumers with live, up-to-the-minute captioned news coverage. Because of these limitations,

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<sup>2</sup> *Reminder Notice* at 4 (footnotes omitted); emphasis in original.

since the effective date of the FCC's captioning rules in 2000, the FCC has required the largest video programming providers to provide real-time captioning (not ENT) for its live news programs. These "non-ENT stations" include "the major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services . . ."<sup>3</sup>

In establishing this mandate, the FCC noted that it did not expect the real-time captioning obligation to impose an economic burden on these larger stations:

We believe that this class of video programming providers are best situated to provide real-time captioning without the imposition of an economic burden consistent with the statutory mandate given the significant number of homes they reach. As a general rule, large networks are more likely to be able to bear the costs of captioning. Moreover, by placing a limit on the use of [ENT] by these video programming providers, we ensure greater accessibility for a significant portion of the American population.<sup>4</sup>

Despite this very clear directive and the FCC's accurate interpretation of this rule in its July 20<sup>th</sup> Notice, on August 7, 2006 – in an action that can only be described as somewhat unusual – the Commission unilaterally released a second Public Notice to further clarify that "in evaluating whether a video programmer has complied with [its] closed captioning rules, [it] will not consider any lack of captioning that results from a *de minimis* or reasonable failure to caption emergency information, so long as critical emergency information is provided through some

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<sup>3</sup> *In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Order on Reconsideration, MM Dkt. NO. 95-176, FCC 98-236, 13 FCC Rcd 19973 (October 2, 1998) at ¶¶ 32-42. (Captioning Reconsideration Order), changes codified at 47 C.F.R. 79.1(e)(3).

<sup>4</sup> *Id.* at ¶39 (footnotes omitted).

method of visual presentation.”<sup>5</sup> This clarification apparently applies to *all* video programming providers, whether or not they must otherwise provide real-time captioning of their live news programming. The Commission goes on to justify its interpretation of the *de minimis* exemption by explaining that “[e]mergency information is the type of information that is typically not available in advance and available only on short notice as contemplated by our rules.” Yet the Commission does not stop there. To make matters far worse, it promises not to “second guess” determinations by video programming providers regarding their ability or inability to caption emergency programming, “so long as their determinations were made in good faith.” The Commission’s analysis is problematic, both procedurally and substantively.

### **III. The FCC’s Clarification Notice Violates the Notice and Comment Requirements of the Administrative Procedure Act**

By stating, first, that the *de minimis* exemption can be used when a provider cannot obtain captioning on short notice, and then, defining emergency information to be the type of information that is available only on short notice, the FCC has, in one fell swoop implemented a rule change without notice and comment from the public. Specifically, the FCC has seemingly relieved all news programmers of having to real-time caption their emergency programming and at the same time authorized all such emergency information to be made “accessible” by a “visual presentation” method other than captioning.<sup>6</sup> This unilateral action violates the Administrative Procedure Act (APA), which requires federal agencies to provide notice of and receive comment

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<sup>5</sup> *Clarification Notice at 1.* Absent public dialogue and an opportunity to receive and review public comment on this issue, one can only speculate about what might have transpired to generate this sudden “clarification.”

<sup>6</sup> To experience what this means in real life to people who are deaf or hard of hearing, the next time emergency information is being televised, Petitioners recommend inserting a videotape, turning off the TV’s sound and, without captions, determining how much of the emergency information can be comprehended. One can then watch the videotape and compare one’s understanding to what was actually said.

from the public on proposed rule changes before they are made.<sup>7</sup> Indeed, nowhere do the FCC's captioning rules even come close to suggesting that all emergency programming – especially where such programming occurs during regularly scheduled broadcasts – are subsumed under the *de minimis* exemption, as the FCC's clarification now suggests. To the contrary, when the FCC's Captioning Reconsideration Order added the *de minimis* exemption, it made clear that it was to be used in only "occasional" situations, where "captioning may be problematic."<sup>8</sup> The Commission further explained "that such situations will be limited, especially as captioned programming becomes the norm and captioning becomes as integral a part of program production as the video and audio."<sup>9</sup> During the eight years since this order was issued, this is precisely what has occurred.

The FCC's Clarification Notice also appears to have incorporated a new standard that providers can meet in order to obtain an exemption from the closed captioning rules. Specifically, by stating that providers will no longer be held to their real-time captioning obligation when there is a "*reasonable failure* to caption emergency information," the Notice seems to offer providers a new way to evade existing captioning obligations. Nowhere does the notice define what would constitute a "reasonable failure" under its rules – other than to allude to the inability to procure captioning services on short notice. Petitioners submit that the unauthorized addition of this new standard, in addition to procedurally violating the APA, is

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<sup>7</sup> 5 U.S.C. §§553(b)(3); (c).

<sup>8</sup> Captioning Reconsideration Order at ¶10. This is consistent with the definition of *de minimis* as it appears at <http://dictionary.law.com>: "of minimum importance" or "trifling" . . . "something or a difference that is so little, small, minuscule or tiny that the law does not refer to it and will not consider it. In a million dollar deal, a \$10 mistake is *de minimis*." Petitioners submit that emergency information can never be considered *de minimis*.

<sup>9</sup> Captioning Reconsideration Order at ¶10.

wholly inappropriate given the Communication Act's clear directive to make new television programming "fully accessible through the provision of closed captions."<sup>10</sup>

#### **IV. Thirty Years of Television History Demonstrates that Absolute Reliance on Industry's "Good Faith" Assertions Will Not Suffice**

As noted above, in the same breath that the FCC has decided to defer to the good faith determinations of video programmers, it has announced to the programming industry that it has no intentions of "second guessing" those determinations. Had the FCC been addressing matters pertaining to visually accessible emergency programming for the first time in its Clarification Notice, Petitioners might be more willing to accept the agency's blanket faith in the video programming industry. However, this Notice follows a long and disturbing history of noncompliance with the Commission's attempts to require accessible emergency programming, a history that can only be described as one of complete and utter disregard for the safety and security of people who are deaf and hard of hearing. This history spans decades, dating back to the mid-1970s, when the very first mandates for visually accessible programming were first developed.

On September 15, 1976, in response to a petition filed by a consumer group called Deafwatch – Demanding Equal Access to Facts and Warnings Aired on Television for Citizens who are Hearing Impaired – the FCC released a rule mandating visual notifications of televised emergencies whenever a broadcast station aired emergency programming aurally or used the Emergency Broadcast System.<sup>11</sup> The rule was in response to Deafwatch's assertions about the

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<sup>10</sup> 47 U.S.C §713(b)(1).

<sup>11</sup> *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, Report and Order, Dkt. 20659, RM-2502, FCC 76-852, 61 FCC 2d 18 (September 15, 1976), reconsideration granted in part, 62 FCC 2d 565 (January 28, 1977), 43 Fed. Reg. 45847 (October 14, 1978). The order created a new rule at 47 C.F.R. §73.675(b), later moved to 47 C.F.R. §73.1250(h).

“shocking failure of television to perform its duty to the hearing impaired,” a failure which, for years, had produced “profoundly devastating results” that had left people with hearing disabilities “physically and psychologically vulnerable to disasters.”<sup>12</sup>

Although the FCC’s 1976 rule provided hope for consumers that their emergency needs would finally be met, the failure of the FCC to enforce this rule allowed the television industry to virtually ignore its directive over the next two decades. For the twenty years following release of the rule, repeated violations of the emergency access provisions were commonplace. Routinely, video program providers failed to provide visual information about floods, tornadoes, blackouts, hurricanes and other emergencies. Although deaf and hard of hearing consumers consistently filed FCC complaints about the failure to provide these visual alerts, rather than issue fines, routinely, the FCC merely issued public notices reminding providers of their obligations.<sup>13</sup>

In 1998, consumers returned to the FCC to request the Commission to both strengthen the emergency access obligations, and to fill the gaps created by prior FCC rules on this issue.<sup>14</sup>

When the FCC sought public comment on the proposed rules in response to the consumer request, it was overwhelmed with consumer reports of the television industry’s tragic failure to

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<sup>12</sup> “Demanding Equal Access to Facts and Warnings Aired on Television for Citizens who are Hearing Impaired,” Petition at 31.

<sup>13</sup> For example, little or no visual televised information was provided when in 1992, Hurricane Andrew destroyed much of Florida, causing the evacuation of nearly 250,000 people, twenty-three deaths, and over \$25 billion in damage. Rather than issue penalties for any of the noncompliant stations, the FCC merely issued a public notice reminding broadcasters of their obligations. *Television Stations are Reminded of Their Obligations Regarding the Broadcasting of Emergency Information in a Manner Accessible to the Hearing Impaired*, Public Notice (September 4, 1992).

<sup>14</sup> Specifically, the 1977 rules only covered television broadcasters, but did not cover cable, satellite, or other television programming providers. While mandates under the emergency alert system rules did cover cable stations, these rules were optional for local emergencies. And although the new captioning mandates were promising, these were subject to an eight year phase-in and during this period, providers could decide for themselves the kinds of programs they wanted captioned. Additionally, under the FCC’s captioning rules, smaller providers could continue using ENT, which provided no guarantees of real-time access to live programming.



provide visually accessible emergency programming. By the time the record in that proceeding closed, deaf and hard of hearing consumers had reported the consistent failure of television stations to provide access to emergency information about floods, hurricanes, earthquakes, fires, tornadoes, blizzards, chlorine spills, water contaminations, plane crashes, train derailments, nuclear hazards, and bombings, this more than *two decades* after FCC mandates had been put into effect to make broadcast emergency programming accessible.<sup>15</sup> It was this abysmal track record that resulted in the FCC's promulgating Section 79.2, a whole new set of rules directing visual notification of all emergency programming.<sup>16</sup>

When these newest emergency access rules went into effect, deaf and hard of hearing consumers again expected to see an end to the abject neglect of their emergency needs by the nation's television stations. Unfortunately, once again – as the FCC is well aware – this was not to be the case. Within a year and a half after the rules' issuance, deaf and hard of hearing viewers in fourteen states had submitted complaints to the agency reporting the failure of their local stations to make their emergency telecasts visually accessible.<sup>17</sup> In 2003 alone, more than 200 complaints were filed against television providers for their failure to provide visual access during emergencies. These and other complaints again prompted the FCC to release a series of reminders about the emergency access obligations, but again, these did little to prompt industry

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<sup>15</sup> Peltz Strauss, Karen, *A New Civil Right: Telecommunications Equality for Deaf and Hard of Hearing Americans* (Washington D.C.: Gallaudet University Press), 2006 at 192-197.

<sup>16</sup> *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Accessibility of Emergency Programming*, Second Report and Order, MM Dkt. No. 95-176, FCC 00-136, 15 FCC Rcd 6615 (April 14, 2000), codified at 47 C.F.R. §79.2.

<sup>17</sup> Individuals from California, Colorado, Florida, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Oklahoma, and Texas reported noncompliance.

compliance.<sup>18</sup> More recently, the FCC has finally begun initiating enforcement actions against noncompliant video programming providers, but we fear that this has been far too little, far too late. Lives have been lost, property has been destroyed, and health and safety have been compromised. Thirty years after the first emergency access rules went into effect, it is time for the FCC to take these mandates far more seriously, and give them the attention and resources they are due.

It is against this most distressing backdrop that the FCC now comes forward to announce that it will defer to the good faith determinations of video programming providers as to whether they will caption emergency information, without second guessing those determinations. The absurdity of relying – without qualification – on the good faith efforts of an industry that has repeatedly and blatantly ignored its emergency access obligations is all too apparent. Moreover, since the time that the FCC first promulgated its rules requiring real-time captioning by the largest stations in 1998, providers have had more than ample opportunity to arrange contracts with captioning agencies to secure the resources (through both on-site and remote services) that are needed to provide captions for emergencies on regularly scheduled newscasts, breaking news and live updates. In many instances, even unscheduled “breaking” newscasts have a 30-minute lead time. Broadcasters, certainly in the Top 25 markets, have a long checklist of things that they must accomplish during that half hour to ramp up for the broadcast, and in 2006, there is little excuse for captioning not to be on that list. To now give these providers carte blanche not to caption any of their emergency news programming, just when these obligations are going into

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<sup>18</sup> *Reminder to Video Programming Distributors of Obligation to Make Emergency Information Accessible to Persons with Hearing or Vision Disabilities*, FCC Public Notices, DA 02-1852 (July 31, 2002); DA 03-2361 (July 18, 2003); DA 04-1595 (May 28, 2004); DA 05-688 (March 2005); DA 05-2438 (September 9, 2005). The last of these notices reminded stations to provide accessible information on Hurricane Katrina evacuation and relief efforts.

full effect, is no less than a slap in the face to consumers who have been waiting so long to simply have the same access to emergency information as their hearing friends, neighbors, colleagues.<sup>19</sup>

Petitioners appreciate that there may be times when unscheduled newsbreaks and unforeseen disasters prevent providers from instantly obtaining the captioning resources that they need to provide real-time captions, and that in such unforeseen circumstances, the FCC may, within its discretion, not penalize stations that have undertaken efforts to provide emergency information in an otherwise visual format. However, this should be the *exception* to the general rule to caption emergency information, not a wholesale replacement for that rule.<sup>20</sup> Moreover, decisions about whether or not an emergency has prevented a station from obtaining the resources needed to caption its programming should be made on a case-by-case basis by the FCC *after* the station has provided sufficient evidence to justify such noncompliance. These determinations should not be made unilaterally by the station, without any FCC oversight. To do otherwise amounts to an abdication of the Commission's enforcement authority, and essentially

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<sup>19</sup> Petitioners understand that providers who are still permitted to use ENT are allowed to either caption or make emergency information accessible by some other form of visual presentation as required by Section 79.2 (e.g. scrolls or crawls). However, we note that a consumer petition filed in June 2004 has sought to expand the number of stations that must use real-time captioning. TDI et al., Petition for Rulemaking, RM-11065 (July 23, 2004). We continue to maintain that this is the only effective means of providing access to live news programming.

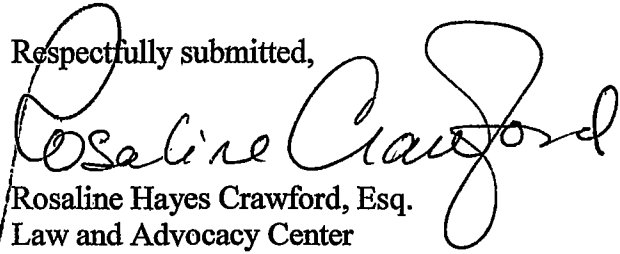
<sup>20</sup> Interestingly, the Clarification Notice states that the FCC does not want to "place video programmers in a position where they are forced to choose between broadcasting emergency information and violating our closed captioning rules or failing to provide their viewers with vital emergency information." Yet the very effect of this Notice would be to allow programmers to fail to provide viewers who cannot hear with the same vital emergency information that the FCC now recognizes as being so critical to the general public. Although programmers have had several years to provide alternate forms of visual information under 79.2 of the Commission's rules, typically they have not done so. It is clear that generally, when a provider chooses not to *caption* emergency programming, it simply provides no visual access at all.

renders the filing of consumer complaints about emergency access under Section 79.1 meaningless.

## V. Conclusion

The FCC's Clarification Notice is flawed both procedurally and substantively. The Notice violates both the Administrative Procedure Act's requirements for notice and comment prior to a rule change, and Congress's intent under Section 713 of the Communications Act to require full television access by people who cannot hear. The *de minimis* exemption contained in Section 79.1(e)(10) of the Commission's rules was never intended to be a miscellaneous catch-all provision for any category of uncaptioned programming, and most definitely not for the entire category of emergency information. Indeed, if there is one instance when captioning should be provided, it is when emergency information needed to further life, health, safety, and property is televised to the public. For this and all of the reasons stated above, Petitioners request that Public Notice DA 06-1600 be immediately withdrawn and/or that the FCC issue an immediate clarification that video programming providers who are required to provide real-time captioning of their live news programming (or who choose to use real-time captioning for their newscasts) have the obligation to use captioning to make their emergency programming visually accessible by people with hearing loss.

Respectfully submitted,

  
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